No. 89-1957

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CECIL ISBELL, CHARLES SULLINS, AND CLINT CORE
Petitioners

v.

GLENDA SUE SMITH,
AND CULLMAN SAVINGS AND LOAN
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE ALABAMA SUPREME COURT

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QUESTIONS PRESENTED

1. Does a state appellate decision which deliberately avoids the procedural record before the Court, and so departs from the settled course of state judicial proceedings that a litigant is selectively denied rights yet available to identically situated litigants, constitute an infringement of that litigant's rights under the Fourteenth Amendment to the U.S. Constitution?

2. Does a state appellate decision which sanctions a collusion between aligned parties, so as to deny arbitrarily to adverse parties their established procedural rights under state law, constitute an infringement of the due process clause of the Fourteenth Amendment to the U.S. Constitution?

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OPINION BELOW

The Orders and Opinion of the Alabama Supreme Court in this matter are unreported: Glenda Sue Smith, et al. v. C.I. et al; Case No. 88-73. They appear as Appendix A hereto.

JURISDICTION

1. The Alabama Supreme Court rendered judgment in this case with an original Opinion on September 29, 1989 and an amended Opinion on December 15, 1989. The Alabama Supreme Court rendered final judgment without an Opinion by overruling the Appellants' last Application for Rehearing on March 2, 1990.

2. Jurisdiction of this Court to issue a writ of certiorari to the Alabama Supreme Court is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution:

Amendment XIV, Section 1:

> "All Persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law shich shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statutes:

28 U.S.C. §1257:

Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:

> (3) By writ of certiorari, shere the validity of a treaty or statute of the United States is drawn in question or where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties, or statutes of, or commission held or authority exercised under, the United States.

Code of Alabama §6-8-101 (1975):

> A party may raise the defense of...improper venue... and, losing thereon, proceed to litigate on the merits, and losing on the merits, the party may appeal and on appeal, attack the judgment both on the merits and on such [venue] grounds...as he urged below.

Alabama Rules of Civil Procedures 82 (b)(1)(A):

> (1) AGAINST RESIDENT INDIVIDUAL. Actions against an individual or individuals having a permanent residence in this state:
>
> > (A) Must be brought in the county where the defendant or any material defendant resides at the commencement of the action, except that if the action is a personal action other than an action on a contract, it may be brought either in the county where the act or ommission complained of occurred, or in the county of the permanent residence of the defendant or one of them.

STATEMENT OF THE CASE

The Petitioner Isbell is the purchaser, and the Petitioners Sullins and Core, are the successor-purchasers of a business located in Madison County, Alabama. The respondent Mrs. Smith is the seller of the business. A dispute involving title to the real estate arose after the sale of the business. The defendants-purchasers at all times resided in Madison County, Alabama.

In the ensuing lawsuit Smith sought $70,125.03 from the Madison County Defendants under her sales contract in which she sold the business to them.* As recited in the sales contract, Smith needed this money to pay off a personal note, secured by a mortgage to Cullman savings and Loan Association on her home. Cullman Savings and Loan had not been a party to Smith's contract with the Madison County Defendants.

At trial Smith testified in regard to her debt to Cullman Savings and Loan:

CROSS EXAMINATION BY MR. BATTLES:

Q. Mrs. Smith, you basically admit that there was a balance owing on the note to Cullman Savings and Loan of $70,125.03?

A. Yes, sir.

Q. Legally you are obligated to pay that?

A. Yes. It is my debt.

Q. Then you're saying, but somebody else owes me the same amount because they became obligated by contract?

A. Right

* See paragraph 3 of the sales contract, which is attached hereto as Appendix B.

Q. And I understand you are now living in Huntsville. Cullman Savings and Loan hasn't foreclosed on your home, have they?

A. No, sir. (Reporter's Transcript 137-138)

Under Alabama law, an action on a contract against an individual must be brought where the defendant or a "material defendant" resides. *Alabama Rules of Civil Procedure* (A.R.Civ.P.) Rule 82 (b)(1)(A). A "material defendant" is one whose "interest in the result of the action is adverse to the Plaintiff with respect to the cause of action against the other defendant." *Ex parte Shelby County*, 516 So. 2d 525, 527 (Ala. 1987).

Nevertheless, Smith sued Isbell, the original Defendant from Madison County, in Cullman County, Alabama. (R.1 et seq.) Isbell immediately both challenged local venue and filed a third-party indemnity claim against his successor-purchasers Sullins and Core, also Madison County residents. (R.20,22) Smith's claim against these Madison County Defendants was on the sales contract. However, she sought to gain Cullman County venue by joining as an additional "defendant" her mortgagee, Cullman Savings and Loan, and suing it for an "accounting." During the litigation, Smith never contested the amount she owed her Savings and Loan, but used this undisputed amount as the basis of her claim against the Madison County Defendants.(Reporter's Transcript 137-138)

Smith's attorney resided in Cullman County, Alabama. During the lawsuit's pendency in Cullman County, from its filing in April, 1985, through its trial in July, 1988, Cullman Savings and Loan did not foreclose on Mrs. Smith's home. (Reporter's Transcript at 137-138) Moreover, Cullman Savings and Loan did not oppose Smith's claim for an "accounting". It filed no documents, motions, or pleadings in opposition to this claim. (R. 55-58 et seq.)

In fact, Cullman Savings and Loan asserted third-party beneficiary status as a plaintiff, and thus alignment with Smith, under her contractual claims against the Madison County Defendants. (R. 48) The Madison County Defendants even moved the trial Court, prior to its final ruling on venue, that "Cullman Savings and Loan should be realigned as a plaintiff in this action, if it is to remain a party." (R. 71) The trial Court declined to rule on this motion. However, the trial Court did sever Smith's claim against Cullman Savings and Loan from her claims against the Madison County Defendants, ruling that her request for an accounting "is an equitable matter and should be resolved either by stipulation or taking of testimony to the Court...". (R. 142)

At trial, Cullman Savings and Loan played a supporting role in favor of Mrs. Smith against the Madison County defendants, both with the elicitation of testimony and the aid of its attorney during evidentiary disputes. (Reporter's Transcript at 137-138, 604) On appeal from Cullman County to the Alabama Supreme Court, Cullman Savings and Loan -- an alleged "material defendant" in this case -- wrote the clerk of the Alabama Supreme Court and adopted *as its own* the Plaintiff Smith's brief in opposition to the Madison County Defendants.

The Cullman County trial Court, early in the litigation, had overruled the objections of the Madison County Defendants to local venue. (R. 20, 53, 59, 71, 77-78) At this point, these Defendants had chosen not to seek a writ of mandamus to the trial Court from the Alabama Supreme Court to compel a transfer to Madison County for trial. Instead, they had chosen to go to trial in Cullman County, and then if need be, raise the venue issue on appeal to the Alabama Supreme Court. The Madison County Defendants had the right to take this route under a longstanding statute:

> A party may raise the defense of...improper venue...and, losing thereon, proceed to litigate on the merits; and, losing on the merits, the party may appeal and, on appeal, attack the judgment both on the merits and on such [venue] grounds...as he urged below.
>
> 1975 *Code of Alabama* §6-8-101.

This statute, § 6-8-101, traced back more than a century to *Alabama Code* 1852, §2255.

After trial the jury returned a verdict for Smith. The trial Court then entered judgment for Smith against the purchaser Isbell for $70,125.03, less a set-off of $3,000.00, and in favor of Isbell against Sullins and Core for the same amount. (R. 254-257) The Madison County Defendants appealed to the Alabama Supreme Court.

On appeal, the lead issue was whether trial venue was proper. In its Opinion, see Appendix A at 9, the Alabama Supreme Court duly recited the rule that in Alabama, "an action [against] an individual must be brought in the county where the defendant or any material defendant resides." A.R.Civ.P. Rule 82 (b)(1)(A). The Court below then proceeded to define "material defendant" under its longstanding precedents:

> A material defendant has been further defined by this Court as "a real and bona fide defendant whose interest in the result of the action is adverse to that of the Plaintiff with respect to the cause of action against the other defendant." *Ex parte Shelby County*, 516 So. 2d 525, 527 (Ala. 1987) (quoting *Copeland v. Loeb*, 112 So. 2d 475, 477 (Ala. 1959).
>
> See Appendix A at 9.

However, after reciting this longstanding rule on what constitutes a material defendant, the Alabama Supreme Court chose in its opinion to ignore those portions of the procedural record as set out supra, that overwhelmingly established the alignment and collusion, of Smith and her savings and Loan. The record of this case, which clearly revealed that Cullman Savings and Loan was not adverse to but aligned with, Smith in respect to her claims against the Madison County Defendants, was simply rejected by the state high court.

In response to the Opinion, the Madison County defendants, in their first Application for Rehearing, asked the Alabama Supreme Court:

> Why is it that this Court did not apply the legal standards for determining material defendants as set out in *Copeland v. Loeb,* supra, and its up-to-date progeny? Where is the adversity of interest between Smith and Cullman Savings and Loan with respect to Smith's claim against the Madison County Defendants? Where is the potential joint liability of Cullman Savings and Loan and the Madison County Defendants to Smith?
>
> Appellants' Brief on Rehearing at 14.

On December 15, 1989, the Alabama Supreme Court overruled the Madison County Defendants' first Application for Rehearing. However, two justices who had originally joined in the Court's Opinion, decided to dissent.

CONSTITUTIONAL ISSUE RESERVED

Petitioners could not and should not have presumed, prior to its occurence, that a state Supreme Court's decision would deprive them arbitrarily of rights available to other litigants. For this reason, the constitutional dimension of

this case could not have been known to the Petitioners until after the appellate judgment in question was rendered.

Nevertheless, the Petitioners did contend, before the final bell rang in the Alabama Supreme Court, that:

> Appellants, citizens of the State of Alabama and the United States, are entitled to have the issues on appeal decided upon the actual record of this case, not some hypothetical one. They are entitled to due process of law, that is, to the settled course of judicial proceedings as established by the law of the State of Alabama. *Frank v. Magnum*, 237 U.S. 309, 326 (1915).
>
> *Appellants' Second Application for Rehearing*, at page 6-7.

The Court below denied this Second Application on March 2, 1990.

REASONS FOR GRANTING THE WRIT

I. The rights of Petitioners when they were Appellants in the Alabama Supreme Court should have been measured, not by rules made to effect them individually, but by general provisions of law as applied to all others in like condition.

The federal question presented in this case arises from fundamental and historic principles inherent in the due

process clause of the Fourteenth Amendment to the U.S. Constitution. That principle is that litigants in state courts cannot be selectively and deliberately denied procedural rights which are admittedly available to identically situated litigants. See *Marchart v. Pennsylvania Railroad,* 153 U.S. 380, 386 (1894). All litigants in state courts are constitutionally entitled to "the settled course of judicial proceedings as established by the law of the State." *Frank v. Magnum,* 237 U. S. 309, 326 (1915).

The procedural setting of this case involves the Petitioners' rights under pre-established and longstanding rules of venue in Alabama. For over a century, Alabama law has allowed a litigant faced with improper trial venue to forgo, if he or she so chooses, a pre-trial mandamus procedure to force remedial transfer of the venue; and instead; to go to trial on the merits, and then if need be, raise the issue on appeal in order to obtain a new trial in the correct venue. 1975 *Code of Alabama* §6-8-101. As set out in the Statement of the Case, *supra,* Petitioners were clearly subjected to improper venue in the trial Court below.

In response, Petitioners chose the course of foregoing mandamus and raising the improper venue by appeal.

However, the Alabama Supreme Court's *Opinion* concluded with this:

> Isbell [the original Purchaser], in losing on the merits before the trial court, properly raised this venue issue on appeal pursuant to Code 1975, §6-8-101; **but see,** *Elmore County Commission v. Ragona,* 540 So. 2d 720, 725 (Ala. 1987), **with regard to the proper use of mandamus.** (emphasis added) Appendix A at 10.

Thus, in one breath the Alabama Supreme Court declared, as it always had, a litigant's right under Alabama law to

raise the venue issue on appeal under this statute, and in the next breath, questioned that right by positing "the proper use of mandamus." The Alabama Supreme Court cannot have it both ways. Either the right exists or it does not.

No doubt the Alabama supreme Court could have properly carved out any exception to rights under Alabama's venue statutes, or offered a new judicial construction of them, either of which could have legitimately defeated the position of the Madison County Defendants in this case. The Constitution offers no impediment to a change of judicial construction of antecedent legislation, except where the good faith of the Court's declaration is successfully impeached. *Stockholders v. Sterling,* 300 U.S. 175, 182, (1937); see also *Patterson v. Colorado ex rel Attorney General,* 205 U.S. 454, 461 (1907).

However, the one route the Alabama Supreme Court could not take consistent with the requirement of "good faith" mentioned in *Sterling, supra,* was to declare a litigant's established right on appeal to have an improper trial venue corrected, but then, by ignoring the procedural record which gave rise to that right, deny it to him through the back door, so to speak.

II. The Alabama Supreme Court could not, within the bounds of the Fourteenth Amendment, sanction a collusive lawsuit so as to deny arbitrarily to Petitioners their established procedural rights under state law.

A state must not so structure an appeal as to arbitrarily deny to some persons rights available to others. *Lindsey v. Normet,* 405 U.S. 56, 74-79 (1972) In this case, through a sanction of collusion between aligned parties, the state appellate decision itself evinced an arbitrary departure from

the settled course of judicial proceedings in Alabama. The Petitioners were injured thereby.

In its Opinion, see Appendix A at 9, the Alabama Supreme Court duly recited the rule that in Alabama, "an action [against] an individual must be brought in the county where the defendant or any material defendant resides." A.R.Civ.P Rule 82 (b)(1)(A). The Court below then proceeded to define "material defendant" under its longstanding precedents:

> A material defendant has been further defined by this Court as "a real and bona fide defendant whose interest in the result of the action is adverse to that of the Plaintiff with respect to the cause of action against the other defendant." *Ex parte Shelby County*, 516 So. 2d 525, 527 (Ala. 1987) (quoting *Copeland v. Loeb*, 112 So. 2d 475, 477 (Ala. 1959).
>
> See Appendix A at 9.

Copeland v. Loeb, the seminal case, in turn cited to *American Jurisprudence* on *Venue* as authority for the above definition of "material defendant", 112 So. 2d at 477.

77 *Am. Jur.* 2d, Venue, §33, for instance, employs virtually identical language on what constitutes a "material defendant":

> While under a statute of this kind, the residence of one of the defendants determines the venue of the action against all, it is essential that the defendant whose residence is made determative of the venue of the action be a necessary party to the action and not one joined solely to justify the bringing of the action in the county of his residence. ***In every case the true test to determine whether or not the venue is proper is whether the defendant served in the***

> ***county where the suit is brought is a bona fide defendant to the action and whether his interest in the result of the action is in any manner adverse to that of the plaintiff with respect to the cause of action against the other defendants.*** In other words, to enable a plaintiff to prosecute a cause of action against a defendant outside the county of the latter's residence because of the joinder of codefendants, there must be a bona fide claim of joint liability. (emphasis added)

Cullman Savings and Loan, the so-called "defendant" resident in Cullman County, Alabama, was also a third-party plaintiff against the Madison County Defendants only, and was clearly aligned with the plaintiff Smith in her efforts to recover money from them. As set out in the Statement of the Case, *supra,* the procedural record and sheer common sense overwhelmingly established their alignment in the trial court and on appeal. Smith wanted to recover from the Madison County Defendants so that she could pay off Cullman Savings and Loan. How then, under its own legal test for a "material defendant", one which would have required Cullman Savings and Loan's interest in the result of the action to be adverse to Smith with respect to her contract claim against the Madison County Defendants, could the Alabama Supreme Court possibly rule that Cullman County venue was proper?

The Alabama Supreme Court did so by issuing the following non sequitur:

> Cullman Savings and Loan Association is a material defendant. Its position is most definitely antagonistic to that of the plaintiff. *Ex parte Shelby County, supra.* Plaintiff's claim against Cullman Savings and Loan Association was for an accounting of the payments applied to the mortgage debt. Her position is that she has paid the portion of the mortgage debt

> due to be paid by her pursuant to her separate contract with Isbell, and that the other original defendant, Isbell, is, by that same contract, liable for the balance of the debt. Cullman Savings and Loan Association asserts that either the Plaintiff or Isbell is responsible for the debt, while Isbell contends that he is not responsible for the debt due to circumstances caused by the plaintiff. Thus, each party's claim is antagonistic toward the others.
>
> See Appendix A at 10.

This part of the state Court's Opinion consists only of circular arguements irrelevant to the Court's own legal test -- as set out in its own cited precedents such as *Ex parte Shelby County, supra,* and *Copeland v. Loeb, supra* -- for what constitutes a ''material defendant'' under Alabama law. This Opinion belies in stark terms the Court's decision to reject the procedural record before it, and to avoid the issue of alignment of the parties.

Moreover, the Alabama Supreme Court's insistence that Cullman Savings and Loan and Mrs. Smith were ''antagonistic'' to each other came as a total surprise to the lawyers in this case, because they had been clearly aligned from the beginning and throughout the trial. When the jury verdict had been announced, for instance, the attorney for Cullman Savings and Loan celebrated in the hall with Smith's attorneys, and lamented only that Smith ''should have asked for legal fees too'' against the Madison County Defendants. Their is no doubt that the Alabama Supreme Court was purposely blind to the procedural record before it.

The deliberate choice of a state Supreme Court to stonewall on the procedural record of a case before it is a fundamental breakdown of the judicial process and a clear denial of Petitioners constitutional rights. If unchecked, such a breakdown breeds a lack of confidence in the

judicial system. It is axiomatic in our system of justice that a government decision affecting property rights be based on the actual record before the decisionmaker. *Accord Goldberg v. Kelly*, 397 U.S. 254, 271 (1970) (applied in context of administrative law)

Does the Constitution protect U.S. citizens against the outright repudiation of the record of a case by a state Supreme Court? Petitioners say it does, whether the procedural right thereby affected is that of venue, or to trial by a predetermined number of jurors, or to the permissible bounds of closing arguement, or the like. The ancient and venerable meaning of "due process" is that a Court must apply its pre-established and continuing procedural rules, such as they are, equally and across the board to all who come before it.*

CONCLUSION AND PRAYER FOR RELIEF

The premises considered, Petitioners request that this Court grant this Petition and vacate as unconstitutional the judgment of the Alabama Supreme Court affirming the trial Court in this case.

* See Meyer, H.H., *The History and Meaning of the Fourteenth Amendment*, (Vantage Press 1977), at 213.

Respectfully submitted, this 30th day of May, 1990.

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CERTIFICATE OF SERVICE

I certify that I have mailed three copies of the foregoing by first class U.S. mail postage prepaid to James R. Knight, P.O. Drawer M, Cullman, AL 35055, and Hayden R. Battles, 405 2nd Avenue, S.W., Cullman, AL 35055. this 30th day of May, 1990.

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APPENDICES

APPENDIX A

THE STATE OF ALABAMA.....JUDICIAL DEPARTMENT
IN THE SUPREME COURT OF ALABAMA
March 2, 1990

88-73

Cecil Isbell, et al.

v.

Cullman Circuit Court
Cv-85-5016

Glenda Sue Smith

IT IS ORDERED that the second application for rehearing filed in the above cause on December 29, 1989, be, and the same is hereby, overruled. NO OPINION.

HORNSBY, CJ - Maddox, Shores, Houston, Steagall and Kennedy, JJ., concur:
Jones and Adams, JJ., dissent.

THE STATE OF ALABAMA.....JUDICIAL DEPARTMENT
IN THE SUPREME COURT OF ALABAMA
December 15, 1989

88-73

Cecil Isbell, et al.

v.

Cullman Circuit Court
Cv-85-5016

Glenda Sue Smith

IT IS ORDERED that the application for rehearing filed in the above cause on October 10, 1989, be, and the same is hereby, overruled. OPINION MODIFIED.

HORNSBY, CJ - Maddox, Shores, Houston, Steagall and Kennedy, JJ., concur:
Jones and Adams, JJ., dissent.

THE STATE OF ALABAMA.....JUDICIAL DEPARTMENT
IN THE SUPREME COURT OF ALABAMA
September 29, 1989

88-73

Cecil Isbell, et al.

v.

Cullman Circuit Court
Cv-85-5016

Glenda Sue Smith

The appeal in this cause having been duly submitted, IT IS CONSIDERED, ORDERED AND ADJUDGED that the judgment of the court below is affirmed.

IT IS FURTHER ORDERED that the costs of appeal be taxed against the appellant(s) as provided by Rule 35, Alabama Rules of Appellate Procedure.

OPINION BY HORNSBY, C.J.
Maddox, Jones, Adams and Steagall, JJ., concur.

THE STATE OF ALABAMA.....JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA
SPECIAL TERM, 1989

Cecil Isbell, et al.

88-73 v.

Glenda Sue Smith

Appeal from Cullman Circuit Court
(CV-85-5016)

HORNSBY, CHIEF JUSTICE.

This case arises out of the sale of a business. The plaintiff, Glenda Sue Smith, sued Cullman Savings and Loan Association for an accounting. She also sued Mr. Cecil Isbell for breach of the sales contract by which he purchased her business.

Ms. Smith originally purchased the business involved in this action from her brother, Ray Bailey. Ms. Smith changed the name of the business from "Rayco"to "Graphic Communications, Inc.," upon purchasing the business, the real estate upon which the business was located, and some of the Rayco assets. In order to borrow the money to purchase this business, Ms. Smith and her husband mortgaged their home in Morgan County to Cullman Savings and Loan association in Cullman, Alabama. The entire amount of the mortgage debt was $70,000; $40,000 was used to pay Bailey for the business.

The business and its real estate were in Huntsville. Ms. Smith's attorney, Charles Sullins, also in Huntsville, prepared the documents for the sale of the business. Sullins represented Ms. Smith and Graphics Communication, Inc., in the defense of several legal matters and other business matters involving the operation of the business. Ms. Smith began to have cash flow difficulties. Sullins referred two acquaintances, Cecil Isbell and Clint Core, to Ms. Smith to discuss their buying her business. After some discussion, Isbell and Core agreed to buy the business and the real estate from Ms. Smith. Sullins prepared the contract of sale.

The written agreement was entered into between Ms. Smith and her husband, Eldridge D. Smith, and Isbell for the sale of Graphic communications, Inc., and the real estate. Paragraph 3 of the agreement referred to the $70,000 debt the Smiths owed to Cullman Savings and Loan Association, and the agreement further indicated that $40,000 of the debt had been incurred through a loan that had been used to purchase the business. Isbell, as purchaser, agreed to pay 4/7 of the total debt, i.e., $40,000. The remainder of the mortgage (3/7 or $30,000) was to be paid by Ms. Smith and her husband.

Between the date of the contract and the time the contract was actually "closed," Ms. Smith's husband died. Ms. Smith collected $30,000 in life insurance benefits, which she applied to the mortgage debt, in payment of 3/7 of her obligation.

Isbell took possession and began to operate the business. Sometime later, Isbell sold an interest in the business to Clint Core. Eventually, Isbell sold the remainder of his interest to Clint Core and Charles Sullins. The sale by Isbell to Core and Sullins was made pursuant to an agreement that purported to indemnify Isbell from loss. Core and Sullins operated the business until it went bankrupt several months later.

Several questions arose following the sale of the business by Ms. Smith. The first question was whether payments were made on the remaining $40,000 debt by Isbell and the subsequent purchasers, Core and Sullins. At some point, Ms. Smith learned from Cullman Savings and Loan Association that the mortgage on her home was in default and that it was threatening foreclosure. The purchasers also learned that before, and at the time of Ms. Smith's sale of Graphics Communications, Inc., to Isbell, a tennant was occupying a portion of the premises. That tenant, Specialty Packaging Company, Inc., and/or its owner, Ronnie Seymore, had entered into an unrecorded ten-year lease with Mr. Bailey, the original owner of the premises. The lease was "discovered" after the purchase of the business by Core and Sullins. All three purchasers contended that Ms. Smith told them that the lease was from month to month. Ms. Smith disagrees.

Subsequent to the Core-Sullins purchase of the business, two outstanding debts of the business came due. One debt was the payroll taxes for the last quarter of the fiscal year that had ended just prior to the signing of Smith's contract with Isbell. Another debt consisted of medical expenses for an employee of Rayco, incurred before Smith purchased the business. Also, a question arose at to the amount, if any, owed by Smith to Sullins for legal fees for work done which was not connected with the sale of the business from Smith to Isbell.

Ms. Smith sued both Isbell and Cullman Savings and Loan Association in Cullman County Circuit Court. Ms. Smith claimed that Paragraph 3 of the agreement for the sale of the business has been breached when Isbell failed to pay the remaining 4/7 of the outstanding loan. Although Ms. Smith also claimed that Paragraph 5 of the agreement pursuant to which Isbell promised to pay Smith an additional $50,000, had been breached, this issue was severed by the trial court and is not at issue in this appeal.

Mrs. Smith's claim against Cullmans Savings and Loan Association was for an accounting. She alleged tht she had paid 3/7 of the debt, and she asked for an accounting regarding the remaining amount due on the mortgage debt, which she contends was the responsibility of Isbell under her contract with him. Defendant Cullman Savings and Loan Association cross-claimed against Isbell, alleging that it was a third-party beneficiary under the sales contract between Mrs. Smith and Isbell. Isbell filed a third-party complaint against the subsequent purchasers, Core and Sullins, based on the indemnity agreement signed at the time of the sale. Core and Sullins filed a claim against Mrs. Smith alleging breach of contract, negligence, misrepresentation, and fraud. Core and Sullins alleged that Mrs. Smith had negligently or recklessly misrepresented to them that Specialty Packaging had only a month-to-month oral rental agreement. Core and Sullins rely on the contract between Isbell and Smith as the basis for their claims against Smith. This Court does not accept this theory, yet such a theory does not affect the outcome of this decision.

The question of venue was raised before the trial court on several occasions. The trial court consistently ruled that venue was proper in Cullman County. The trial court also held, at one point, that Isbell, by not contesting venue at the appropriate time, had waived his right ever to contest it. The court entered summary judment for Isbell on Isbell's third-party indemnity claim against Core and Sullins.

A jury trial was held on Smith's claim against Isbell under Paragraph 3 of the contract and on Core and Sullins' claim against Smith. Smith's claim against Cullman Savings and Loan Association for an accounting was reserved by the court, it being equitable in nature. The jury returned a verdict in favor of Ms. Smith for $80,125.03. The jury also returned a verdict for Ms. Smith on the Core-Sullins claims against her. Judgment was entered on those verdicts.

The defendants filed a motion for JNOV and a motion for new trial. The trial court observed that the plaintiff had requested that the judgment in her favor be reduced from $80,125.03 to $70,125.03 to conform to the evidence, and the court reduced the judgment accordingly. The trial court, also at the plaintiff's request, entered judgment for Sullins for $3,000 for attorney fees based on prior work he had done for her; that judgment was supported by the evidence. The trial court otherwise denied the motion for JNOV and for a new trial. As previously indicated, summary judgment was entered for Isbell against Core and Sullins on Isbell's indemnity claim. Isbell, Core, and Sullins have appealed.

ISSUES REPRESENTED

The defendants have raised four issues on appeal to this Court. First, whether venue in Cullman County was proper; second, whether the trial court erred in overruling objections by counsel to closing arguments made with regard to Sullins's status as an attorney; third, whether the trial court abused its discretion in refusing a requested jury charge on whether the three purchaser's were required to perform futher under their contracts (i.e., to continue making Smith's payments to Cullman Savings and Loan Association) after Smith had committed and alleged material breach; and fourth, whether the trial court abused its discretion id denying the three purchasers' motions for JNOV.

VENUE

Isbell, Core, and Sullins claim error with regard to the court's ruling on venue. The plaintiff sued an individual defendant, Isbell, and a corporation, Cullman Savings and Loan Association. An action brought by an individual "must be brought in the county where the defendant or any material defendant reside." Rule 82(b)(1)(A), A.R.Civ.P. Further, Alabama Code 1975, §6-3-2(a)(2),

provides that "[a]ll actions on contracts ... must be commenced in the county in which the defendant or one of the defendants resides." With respect to domestic corporation, § 6-3-7 provides that "a domestic corporation may be sued in any county in which it does business by agent or was doing business by agent at the time the cause of action arose."

This Court had defined the term "material defendant" as "'one whose position is antagonistic to that of the plaintiff's because relief is sought against him.'" *Ex parte Shelby County*, 516 So. 2d 535, 527 (Ala. 1987) (quoting *Ex parte Ford*, 431 So. 2d 1194, 1196 (Ala. 1983), quoting *Alabama Youth Services Board v. Ellis*, 350 So. 2d 405, 408 (Ala. 1977)). A material defendant has been further defined by this Court as "'a real and bona fide defendant whose interest in the result of the action is adverse to that of the plaintiff with respect to the cause of action against the other defendant.'" *Ex parte Shelby County*, 516 So. 2d at 527 (quoting *Copeland v. Loeb*, 269 Ala. 295, 297, 112 So. 2d 475, 477 (1959)).

Venue is determined at the time the suit is filed. *Elmore County Comm'n v. Ragona*, 540 So. 2d 720, 725 (Ala. 1989); *Ex parte Shelby County*, 516 So. 2d 525, 527 (Ala. 1987); *Ex parte Hawkins*, 497 So. 2d 825 (Ala. 1986). Further,

> "where several claims or parties have been joined, the suit may be brought in any county in which any one of the claims could properly have been brought. Whenever an action has been commenced in a proper country, additional claims and parties may be joined, pursuant to Rules 13, 14, 22, and 24, as ancillary thereto, without regard to whether that county would be a proper venue for and independent action on such claims or against such parties."

Rule 82(c), A.R.Civ.P. The burden of proving improper venue is on the party raising the issue. *Ex parte finance America Corp.*, 507 So. 2d 458 (Ala. 1987).

The original complaint was filed against Isbell, a resident of Madison County, and Cullman Savings and Loan Association, a domestic corporation doing business in Cullman County. Venue in Cullman County is proper as to Cullman Savings and Loan Association, because it "may be sued in any county in which it does business." Further, even though several parties have been joined in this lawsuit, the suit is proper in any county in which any one of the initial claims could properly have been brought. Rule 82(c), A.R.Civ.P.

Cullman Savings and Loan Association is a material defendant. Its position is most definitely antagonistic to that of the plaintiff. *Ex parte Shelby County, supra.* Plaintiff's claim against Cullman Savings and Loan Association was for an accounting of the payments applied to the mortgage debt. Her position is that she has paid the portion of the mortgage debt due to be paid by her pursuant to her separate contract with Isbell, and that the other original defendant, Isbell, is, by that same contract, liable for the balance of the debt. Cullman Savings and Loan Association asserts that either the plaintiff or Isbell is responsible for the debt, while Isbell contends that he is not responsible for the debt due to circumstances caused by the plaintiff. Thus, each party's claim is antagonistic toward the others.

Isbell, in losing on the merits before the trial court, properly raised this venue issue on appeal pursuant to Code 1975, § 6-8-101; but see, *Elmore County Comm'n v. Ragona*, 540 So. 2d 720, 725 (Ala. 1989), with regard to the proper use of mandamus.

OBJECTIONS DURING CLOSING ARGUMENTS

The second issue raised by the defendants (i.e., Isbell, Core, and Sullins) concerns remarks made during the trial

with regard to Sullins's being an attorney. The defendants refer in their brief to "negative innuendo" throughout the trial, saying that the "pounding culminated in closing argument in subtle but insidious form." No objections were made during the trial, as the defendants admit, but the issue was raised in the post-trial motions. The plaintiff does not dispute that some negative statements were made, but insists that those statements were part of the exercise of the counsel's skills of zealous advocacy for his client.

This Court has generally held that improper arguments by an attorney are not sufficient grounds for a new trial without a timely objection and a ruling by the trial court or a refusal by the trial corut to make a ruling. *Lawrence v. Alabama Power Co.*,, 385 So. 2d 986, 987 (Ala. 1980). The exception to this rule is "where the comment is so prejudicial that its effect is ineradicable." *Banner Welders, Inc. v. Knighton,* 425 So. 2d 441, 450 (Ala. 1982). This Court has stated previously:

> "The law in this area is concisely stated in *Alabama Power Company v. Henderson,* 342 So. 2d 323 (Ala. 1977):
>
> > "'Without due objection by counsel or a motion to exclude and a ruling by the trial court, improper argument of counsel is not ground for new trial nor the subject of review on appeal. *An exception is where it can be shown that counsel's remarks were so grossly improper and highly prejudicial as to be beyond corrective action by the trial court.* The remarks in this case do not fall within that category of statements so grossly improper or highly prejudicial as to place it within the exception to the general rule. Since there was no timely objection by counsel, there is no error for this court to review. *Johnson v. State,* 272 Ala. 633, 133 So. 2d

53 (1961); *Anderson v. State*, 209 Ala. 36, 95 So. 171 (1922); *Prescott v. Martin*, Ala. 331 So. 2d 240 (1976).' (Emphasis added.

"The plaintiffs contend that their motion was due to be granted because defense counsel's remark was so grossly improper and highly prejudicial as to be beyond corrective action by the trial judge.

"It is well established that a ruling on a motion for a new trial rests within the sound discretion of the trial judge. The exercise of that discretion carries with it a presumption of correctness, which will not be disturbed by this Court unless some legal right is abused and the record plainly and palpably shows the trial judge to be in error. *Hill v. Cherry*, 379 So. 2d 590 (Ala. 1980). In *Calvert & Marsh Company v. Pass*, 393 So. 2d 955 (Ala. 1980), the Court stated:

> "'... [E]ach case would have to be decided on its own merits and much would depend upon the issues, parties and the general atmosphere of a particular case. *Lawrence v. Alabama Power Co.*, 385 So. 2d 986 (Ala. 1980). Viewed in the context argued, this one isolated remark does not fall within that category of remarks sufficiently prejudicial to place it within the exception to the general rule.
>
> "'We have recognized that, since the trial court is present at the time when the argument is made, the trial court has great latitude in ruling on the propriety of counsel's arguments. *Prescott v. Martin*, 331 So. 2d 240 (Ala. 1976). In particular, in passing on the question of ineradicable bias much should be left to the enlightened judgment of the trial court, with the usual presumptions in favor

> of the ruling made to that end. *Alabama Power Co. v. Bowers*, 252 Ala. 49, 39 So. 2d 402 (1949); *Pacific Mutual Life Insurance Co. v. Green*, 232 Ala. 50, 166 So. 696 (1936)....'

"See also *Daniel Construction Company v. Pierce*, 270 Ala. 522, 120 So. 2d 381 (1960), and *State Farm Mutual Automobile Insurance Company v. Boyer*, 357 So. 2d 958 (Ala. 1978).

"There is no hard and fast rule as to when a remark made by counsel in closing argument is deemed to be so grossly improper and highly prejudicial as to be ineradicable from the minds of the jurors, notwithstanding a timely admonition from the trial judge. Each case must be decided in light of the peculiar facts and circumstances involved, and the atmosphere created, in the trial of each particular case.

"Defense counsel's closing argument in the present case was not transcribed by the reporter. The record contains only the jury's verdict, the trial court's judgment entered on the verdict, the plaintiff's motion for a new trial, and the trial judge's order denying that motion. Thus, we have no record of the exact remark, nor of the context in which the remark was made. The trail judge recognized the impropriety of the remark in his order denying the plaintiffs' motion for a new trial, and acknowledged that he would have sustained an objection to it, had one been made, and would have admonished the jury accordingly. It is clear that the trial judge did not consider the remark's effect on the jury to be so prejudicial as to be beyond cure."

Hill v. Sherwood, 488 So. 2d 1357, 1358-59 (Ala. 1986).

In this case, there were no objections made during the argument. The record contains only the objection to a reference in the plaintiff's closing argument that the plaintiff could lose her home by losing this case. That objection was made just after the closing argument and was overruled by the trial judge. The trial judge felt that any such remarks constituted proper argument, and such a ruling by the trial court rests within his sound discretion and will not be disturbed in the absence of plain and palpable error. *Hill v. Cherry,* 379 So. 2d 590, 592 (Ala. 1980). A reading of the record reveals that the statements made throughout the trial are not so cumulative that they were beyond the ability of the trial court to cure,. Without further objections in the record or a motion for curative remarks, there is no basis for a contention of error.

JURY CHARGE

The defendants claim error in that specific jury charges were not given by the trial judge.

The defendants claim that a jury charge should have been given stating that if "Plaintiff did not perform under the contract, then you must find that the Defendants were discharged from their duties to perform under the contract." An additional charge was submitted to the trial court which was also refused. This charge included a recital of particular facts and a charge that "[i]f you find from a preponderance of the evidence that this existence of the lease was a material breach of the contract ... then you must find that [the defendants] were legally discharged from having to make any payments to [the plaintiff]." Rule 51, A.R.Civ.P., states clearly that

> "[t]he refusal of a requested, written instruction, although a correct statement of the law, shall not be cause for reversal on appeal if it appears that the same rule of law was substantially and fairly given

to the jury in the court's oral charge or in charges given at the request of the parties."

This rule is fully supported by the case law. *See Coleman v. Steel City Crane Rentals, Inc.*, 475 So. 2d 498 (Ala. 1985), cert. denied, 476 U.S. 1104, reh'g denied, 477 U.S. 909 (1986); *Long Lewis Hardware Co. v. Lightsey, 392 So. 2d 545 (Ala. Civ. App. 1980), cert. denied, 392 So. 2d 548 (Ala. 1981); M.C. West, Inc. v. Battaglia*, 386 So. 2d 443,449 (Ala. Civ. App.), cert. denied, 386 So. 2d 450 (Ala. 1980); *American Fire & Cas. Ins. Co. v. Bryan*, 379 So. 2d 605 (Ala. Civ. App. 1979).

A review of the record in this case reveals that the requested charge was fairly and substantially covered by the charge given. The court gave a general charge as to the elements of a contract, including a statement regarding the plaintiff's performance. The court also included a statement regarding the lease in its beginning charges to the jury. Additionally, extensive instructions were given with regard to any possible misrepresentations made by the plaintiff.

The defendants further claim error with regard to evidentiary rulings made by the trial court. Specifically, the trial judge refused to admit certain letters, which the defendants claim would show the legal importance of the lease and the materiality of the plaintiff's alleged breach and would support their claim for damages. A review of the record reveals that the original lease was made a part of the record. Further, the trial court allowed testimony from witnesses about the information contained in the letters. The rulings on objections during the witnesses' testimony were in favor of the defendants. The rulings by the trial court in this regard were proper.

DENIAL OF POST-TRIAL MOTIONS

The defendant's final assertion of error concerns the denial of their motions for JNOV. A motion for JNOV should be denied if there is any conflict in evidence for

The jury to resolve. *Gary v. Kirkland*, 514 So. 2d 970, 971 (Ala. 1987); *Elrod v. Ford*, 489 So. 2d 534, 537 (Ala. 1986), citing *Handley v. City of Birmingham*, 475 So. 2d 1185, 1187 (Ala. 1985). Further, in this Court's review of a JNOV, the evidence must be viewed in a light most favorable to the nonmoving party. *Id.*, citing *Wadsworth v. Yancey Bros. Co.*, 423 So. 2d 1343, 1345 (Ala. 1982). A motion for JNOV is properly granted only when the movant would have been entitled to a directed verdict. *Luker v. City of Brantley*, 520 So. 2d 517, 521 (Ala. 1987); *Wright v. Fountain*, 454 So. 2d 520 (Ala. 1984). "Such a motion tests the sufficiency of the evidence and, if granted, discloses that, without weighting the credibility of the evidence, there can be only one reasonable conclusion from the evidence as to the proper judgment." *Luker*, 520 So. 2d at 521; citing *Morgan v. South Central Bell Telephone Co.*, 466 So. 2d 107 (Ala. 1985).

A review of the record reveals that the motion for JNOV was properly denied. The trial court's judgment is due to be affirmed.

AFFIRMED.

Maddox, Jones, Adams, and Steagall, JJ., concur.

88-73

Cecil Isbell, et al. v. Glenda Sue Smith

On Application for Rehearing

HORNSBY, CHIEF JUSTICE

APPLICATION OVERRULED; OPINION MODIFIED.

Maddox, Shores, Houston, Steagall, and Kennedy, JJ., concur

Jones and Adams, JJ., dissent

88-73 - *Cecil Isbell v. Glenda Sue Smith*

ADAMS, JUSTICE (dissenting).

I dissent from the denial of rehearing. Rule 82(b)(1)(A), A.R.Civ.P., provides that actions against an individual or individuals having a permanent residence in this State must be brought in the county where the defendant or any material defendant resides at the commencement of the action.

Plaintiff sued Cullman Savings and Loan Association and three individuals who resided in Madison County. The only claim made against Cullman Savings & Loan Association was for an accounting. The trial judge severed this part of the case from the issues in the litigation before us today.

The threshold issue is whether, based on the presence of Cullman Savings and Loan Association as a defendant in the litigation, venue was proper in Cullman County. In order to maintain this action in Cullman County, the savings and loan association must have been a *material defendant.* In other words, the presence of Cullman Savings and Loan as a defendant should not be allowed to create venue in Cullman County if it is not a *material* defendant. To rule otherwise would allow a sham defendant to be interposed in a lawsuit merely to establish venue in a desired county in multiple-party cases where the other defendants are residents of other counties.

On reconsideration, I do not believe that Cullman Savings and Loan Association is a material defendant. We have said that a "material defendant" is "one whose position is antagonistic to that of the plaintiff because relief is sought against him." *Ex parte Ford,* 431 So. 2d 1194, 1196 (Ala. 1983). We have also said that a material defendant is a "real and bona fide defendant whose interest in the result of the action is adverse to that or the plaintiff with respect to the cause of action against the other

defendant." *Ex parte Shelby County,* 516 So. 2d 525, 527 (Ala. 1987). Here, there is no adverseness in the true sense between the plaintiff and the savings and loan association. Plaintiff is seeking money from the other defendants, who reside in Madison County, to pay off the balance of the debt due to the savings and loan association, and the association is interested in getting paid. In that sense, Cullman Savings and Loan Association probably should have been realigned as a plaintiff. As a matter of fact, defendants Sullins and Core made a motion to the trial court prior to its final ruling on venue, stating that "Cullman Savings & Loan Association should be realigned as a plaintiff in this action, if it is to remain a party." However, the trial court did not rule on this motion. So similar are the interests of the plaintiff and the savings and loan association that on appeal the savings and loan association joined in and adopted the plaintiff's brief as its own. Furthermore, the trial judge indicated early on in the litigation that any order that he might render for any sum of money, if any, would be in favor of the plaintiff Smith *and/or* Cullman Savings and Loan Association.

We said in *Copeland v. Loeb,* 269 Ala. 295, 112 So. 2d 475 (1959):

> "Where there are several defendants and the residence of one is made determinative of the venue of the action, the complaint must state a course of action against the said defendant; ... the resident defendant must be aparty against whom relief is sought ... The resident defendant must be a real and bona fide defendant whose *interest in the result of the action is adverse to that of the plaintiff* with respect to the cause of action against the other defendant."

269 Ala. at 297, 112 So. 2d at 477. (Emphasis added

For the foregoing reasons, I must respectfully dissent from the denial of the application for rehearing in this

cause. Plaintiff does not meet the threshold requirement of venue as set out in our cases and rules of court.

Jones, J. concurs.

88-73

Cecil Isbell, et al. v. Glenda Sue Smith

On Application for Second Rehearing

APPLICATION OVERRULED

HORNSBY, CHIEF JUSTICE.

Maddox, Shores, Houston, Steagall, and Kennedy, JJ., concur.

Jones and Adams, JJ. dissent.

APPENDIX B

Paragraph 3 of the Sales Contract Between the Parties

3. The Purchaser agrees to assume and pay an amount equal to $40,000.00 of the current note which the Sellers have placed against their home with Cullman Savings and Loan Association, Cullman, Alabama. The said note is currently in the amount of $70,000.00; however, only $40,000.00 of which was used to invest in the business, equipment and real estate which the Sellers are now agreeing to sell. It is agreed that the Purchaser shall pay four-sevenths of the total $70,000.00 loan, together with four-sevenths of the interest payments on said total note. It is further agreed that the Sellers shall pay the remaining three-sevenths of the principal and interest as the payments thereon become due and payable. It is further agreed that the Purchaser many, at his option, continue to make monthly payments on the said sum of money for a period of 24 months from the closing date of this transaction. That at the expiration of 24 months from the closing date of this transaction, the Purchaser shall then pay to the Sellers and/or the mortgagee on the Sellers' home the remaining unpaid portion of the Purchaser's share of the expense amounting to four-sevenths of the original $70,000.00 loan less any reductions in principal in accordance with said formula. The Purchaser retains the right to prepay his proportionate share of said loan at any time without penalty.